Supreme Court of the United States

OCTOBER TERM, 1903

No. 141

BANKERS' MUTUAL CASUALTY COMPANY,

Plaintiff in Error,

vs.

THE MINNEAPOLIS, ST. PAUL & SAULT SAINTE MARIE RAILWAY COMPANY,

Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE EIGHTH CIRCUIT.

I.

OF THE JURISDICTION OF THE COURT.

The first question which arises in this case is that of the jurisdiction of this court to review the judgment of the Circuit Court of Appeals on writ of error.

1. Section 6 of the Circuit Court of Appeals Act provides that the Circuit Court of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error, final decisions in the Circuit Court in all cases other than those provided for in Section 5 of that Act, defining the cases which may be taken to the Supreme Court directly from the Circuit Court. It further provides that the decisions of the Circuit Court of Appeals shall be final in all cases where the *jurisdiction of the Circuit Court depends entirely upon diverse citizenship of the parties;* also in other cases not involved here. It is further provided that in all cases not made final in said Section

6, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1000.00 besides costs.

It is necessary, therefore, to inquire into the grounds of the jurisdiction of the Circuit Court in this case in order to determine the jurisdiction of this Court.

It clearly appears that the Circuit Court acquired jurisdiction on the ground that the parties were citizens of different states. (Record page 31). But that is not sufficient by the very terms of the statute and this Court has so decided.

Colorado Central Mining Co. v. Turck, 150 U. S. 138;
Borgmeyer v. Idler, 159 U. S. 408.

There is but one other possible ground which can be claimed as the basis of jurisdiction, namely, that this is a suit "arising under the constitution or laws of the United States." But this must clearly appear from the amended complaint itself, unaided by any claim made in the argument of counsel or any ground of the decision of the Court. It makes no difference how many federal questions may have come into this case after the Circuit Court acquired jurisdiction, because if the jurisdiction was in fact acquired solely upon the ground of diverse citizenship the decision of the Circuit Court of Appeals is final by the clear words of the statute; and it has been so decided by this Court.

Loeb v. Columbia Township Trustees, 179 U. S. 472;
American Sugar Refining Co. v. New Orleans, 181 U. S. 277;
Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290.

So it becomes necessary to consider all the allegations of the amended complaint that could in any view be relied on in support of this ground of jurisdiction claimed by plaintiff in error; because upon the statement of fact therein the Circuit Court acquired jurisdiction, and not otherwise.

2. The amended Complaint (Record, pp. 31-37), after stating the citizenship of the parties, alleges as follows:

> "That during the whole year A. D. 1900, and up to the present time, defendant is and was en-

gaged in carrying the United States mail between the terminal and intermediate stations located upon and along its said line of railroad, under and by virtue of the statutes and laws of the United States, and the regulations established by the Postoffice Department of the United States Government and in pursuance of a fixing of the compensation to be paid to the defendant by the United States Government for carrying said mails and the person in charge thereof, based upon the last preceding reweighing of said mails and upon notice in writing, in the usual form, from the Second Assistant Postmaster General of the United States, requiring defendant to carry said mails and the person in charge thereof.

"That said depot, at or near the town of Harvey, was an intermediate station on that part of defendant's said line of Railroad within the State of North Dakota, which extends from the Station at Hankinson to the Station at Portal, and the Railroad line between said Stations at Hankinson and Portal is designated by and known to the Postoffice Department of the United States, as Railroad Route No. 161,018, being a distance of 344.58 miles, and the compensation fixed by the United States Postoffice Department to be paid annually by the United States to Defendant, during all of the period herein referred to for the carriage of said mails and the person in charge thereof is and was the sum of sixty-four thousand eight hundred and fifteen and 49-100 dollars ($64.815.49) at the rate of $188.10 per mile.

"That this substituted plaintiff is not in possession of the aforesaid notice to defendant, and is unable to attach to this petition said notice or a true copy thereof.

"That during all of the period hereinbefore referred to, there was no contract of any kind between defendant and the United States Government, concerning or providing for the carriage, by defendant, of said mails, or any part thereof, or of the person in charge of said mails, upon or along defendant's said line of railway or any part thereof." (Record, pp. 31 and 32).

Then follow allegations covering the sending of the money package in question in the custody of the agents of the Government, other than the defendant and its employes, to Harvey, and the complaint alleges further:

> "That upon the arrival of defendant's said train and postal car at said Town of Harvey, North Dakota, said railway mail clerk or other postal official, between eleven and twelve o'clock of said night, delivered said mail sack, duly locked, together with said registered package of currency therein contained to one James Magson, the night station agent, or night operator of defendant at said Town of Harvey, that said night station agent or night operator, was not sworn as an official or employee of the Postoffice Department of the United States Government, as required by law, but was then and there employed and duly authoried by the defendant to receive and take charge of all mail matter received over defendant's said line of Railway, at said Town of Harvey, including the mail sack or mail pouch containing said package of currency, and to deposit same in defendant's depot, at Harvey, North Dakota, and did so receive, take charge of and deposit said mail sack, or mail pouch.
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> "That defendant was not sworn as an official or employee of the Postoffice Department of the United States Government, and had not subscribed or sworn to any oath relating to or concerning the carriage of the United States Mails, or the performance of defendant's duties as such carrier of the mails.
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> "That Section 713 of the postal laws and regulations of the United States of the year A. D. 1893, which was in force at the time of the receipt and transmission of said registered postage is in words and figures as follows, to-wit: 'The railroad company will also be required to take the mails from and deliver them into all intermediate postoffices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed.'

> "That said Postoffice at Harvey was an intermediate postoffice and was located not more than 80 rods from defendant's railroad station, or depot, at, or near said Town of Harvey.
>
> "That under said postal regulation it was the duty of said defendant to provide a sufficient and safe receptacle or place for the safety and security of said mail while in its said custody, also to safely care for and guard said mail sack, and its contents during the night, also to safely deliver the same to the postmaster or postmistress at the Postoffice in said Town of Harvey, North Dakota." (Record, pp. 34 and 35).

Then follows an account of the alleged lack of care of the defendant and its agent, the larceny of the money package, and demand for judgment.

3. The sufficiency of this complaint to sustain the claim of jurisdiction on the ground that it shows a suit "arising under the Constitution or laws of the United States" must be tested by rules firmly settled by the decisions of this Court.

In *Gold-Washing Company v. Keyes*, 96 U. S. 199, 202, Mr. Chief Justice Waite used the following language:

> "The office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises.
>
> "In this petition, the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable mines that can only be worked by the hydraulic process, which necessarily requires the use of the channels of the river and its tributaries in the manner complained of; and they allege that they claim the right to this use under the provisions of certain specified acts of Congress. They also allege that the action arises under, and that its determination will necessarily involve and require the construction of, the laws of the United States specifically enumerated, as well as the pre-emption laws. They state no facts

to show the right they claim, or to enable the Court to see whether it necessarily depends upon the construction of the statutes.

"Certainly, an answer or plea, containing only the statements of the petition, would not be sufficient for the presentation of a defence to the action under the provisions of the statutes relied upon. The immunities of the statutes are, in effect, conclusions of law from the existence of particular facts. Protection is not afforded to all under all circumstances. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough; for that is the precise question the court is called upon to determine.

"The statute referred to contain many provisions; but the particular provision relied upon is nowhere indicated. A cause cannot be removed from a State court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or law of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. That this was the intention of Congress is apparent from Sect. 5 of the Act of 1875, which requires the Circuit Court to dismiss the cause, or remand it to the State court, if it shall appear, 'at any time after such suit has been brought or removed thereto, that such suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.'

"Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading (1 Chit. Pl. 213), that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or

> some law or treaty of the United States. If these facts sufficiently appear in the pleadings, the petition for removal need not restate them; but, if they do not, the omission must be supplied in some form, either by the petition or otherwise. Under the application of this rule, we think that the record in this case is insufficient, and that the Circuit Court did not err in remanding the cause."

What is said here is in essence re-affirmed in *American Sugar Refining Company, v. New Orleans,* 181 U. S. 277, where the Court, speaking by Mr. Chief Justice Fuller, says on the same subject:

> "A case so arises where it appears on the record from the plaintiff's own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution, or some law, or treaty, of the United States." Citing *Gold Washing & Water Co. v. Keyes,* 96 U. S. 199; *Blackburn v. Portland Gold Mining Co.,* 175 U. S. 571; *Western Union Telegraph Co. v. Ann Arbor Railroad Company,* 178 U. S. 239.

Again is *Ansbro v. United States,* 159 U. S. 695, the Court spoke as follows:

> "A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, *but a definite issue in respect of the possession of the right must be distinctly deducible from the record* before the judgment of the Court below can be revised on the ground of error in the disposal of such a claim by its decision."

In *McCain v. Des Moines,* 174 U. S. 168, the Court, speaking by Mr. Justice Peckham, says:

> "The facts alleged must show the nature of the suit and it must plainly appear that it arises under the Constitution or laws of the United States; that is, there must be a real and substantial dispute as to the effect or construction of the Constitution or some law of the United States upon the determination of which the recovery depends."

In *Bridge Proprietors v. Hoboken Company*, 1 Wall. 116, 143, Mr. Justice Miller, commenting on the rules laid down in *Crowell v. Randall*, 10 Peters 368, and *Armstrong v. The Treasurer of Athens County*, 16 Pet. 281, said:

> "Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular act of Congress, or part of the Constitution supposed to be infringed by the State law, ought to be pointed out, it had never been held this should be done in express words. But the true and rational rule is, *that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error*, and that the right thus claimed by him was denied."

In *Starin v. New York*, 115 U. S. 248, 257, it was said by Mr. Chief Justice Waite, speaking for the Court:

> "The character of a case is determined by the questions involved. Osborne v. Bank of the United States, 9 Wheat. 824. If from the questions it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States within the meaning of that term as used in the Act of 1875. Otherwise not. Such is the effect of the decisions on this subject." Citing *Cohens v. Virginia*, 6 Wheat. 264, 379;

Osborn v. Bank of the United States, 9 Wheat. 737, 824; *The Mayor v. Cooper*, 6 Wall. 247, 252; *Gold Washing & Water Co. v. Keyes*, 96 U. S. 199, 201; *Tennessee v. Davis*, 100 U. S. 257, 264; *Railroad Co. v. Mississippi*, 102 U. S. 135, 140; *Ames v. Kansas*, 111 U. S. 449, 462; *Kansas Pacific v. Atchison R. R.*, 112 U. S. 414, 416; *Provident Savings Co. v. Ford*, 114 U. S. 635, 641; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11.

In *Shreveport v. Cole*, 129 U. S. 36, Mr Chief Justice Fuller, delivering the opinion of the Court, said:

> "Unless this suit 'was one arising under the Constitution or laws of the United States' the Circuit Court had no jurisdiction; and if it did not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or some law upon the determination of which the recovery depended, then it was not a suit so arising."

In *New Orleans v. Benjamin*, 153 U. S. 411-424, the Court by Mr. Chief Justice Fuller, said:

> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, then it is not a suit arising under the Constitution."

In *St. Joseph, etc., Ry. v. Steele*, 167 U. S. 659, the Court, speaking by Mr. Justice Shiras, said:

> "There must be a real, substantial question on which the case may be made to turn. Nor can jurisdiction be inferred argumentatively from the averments in the pleadings, but the averments should be positive." *Hanford v. Davies*, 163 U. S. 273, 279.

In *Hanford v. Davies*, Mr. Justice Harlan, speaking for the Court, said:

> "But this allegation of want of jurisdiction in the probate court is too general and indefinite to show that its proceedings were wanting in due process of law. If the purpose was to present a case under the clause of the Constitution relating to due process of law, the grounds upon which the Federal court could take cognizance of a suit of that character between citizens of the same state should have been clearly and distinctly stated in the bill. It is well settled that, as the jurisdiction of a Circuit Court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears; and that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments should be positive. *Brown v. Keene*, 8 Pet. 112; *Grace v. American Central Ins. Co.*, 109 U. S. 278, 283, and authorities cited. These principles have been applied in cases where the jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship. But they are equally applicable where its original jurisdiction of a suit between citizens of the same State is invoked upon the ground that the suit is one arising under the Constitution or laws of the United States. We are not required to say that it is essential to the maintenance of the jurisdiction of the Circuit Court of such a suit that the pleadings should refer, in words, to the particular clause of the Constitution relied on to sustain the claim of immunity in question, but only that the essential facts averred must show, not by inference or argumentatively, but clearly and distinctly, that the suit is one of which the Circuit Court is entitled to take cognizance. *Ansbro v. United States*, 159 U. S. 695."

In *Western Union Telegraph Co. v. Ann Arbor R. R.*, 178 U. S. 239, 243, Mr. Chief Justice Fuller, speaking for the Court, said:

> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground." Citing, *Gold Washing & Water Co., v. Keyes*, 96 U. S. 199; Blackburn *v. Portland Gold Mining Co.*, 175 U. S. 571.

4. The patent questions arising in the suit disclosed by the amended complaint as a whole, upon the decision of which the result depends, are evidently these: Was the money lost by negligence? If so, then was the relation between the plaintiff, or its assignor, and the defendant such that this action could be maintained? These are questions arising every day in the courts of the country and they are determined upon general principles of law. Is there anything which differentiates this case and brings it within the rules laid down by the Court, supra. Does it appear that any right asserted by the plaintiff will be defeated by one construction of the Constitution, or any law of the United States, or sustained by the opposite construction? Can the court from inspecting this complaint conclude that any such issue was raised by the plaintiff, or that the case was based upon any such consideration? We have, to be sure, a transaction connected with the United States Mail service, which service had its origin in the Constitution and laws of the United States, the same as any other function of government; and if there had been no provision of the Constitution authorizing Congress to establish postoffices and post routes, and no laws passed by the Congress in the exercise of that power, certainly that transaction could not have arisen. But it

seems too plain for argument that such considerations do not bring this case within the rules.

From the language quoted it is plain that no "title, right, privilege or immunity under the Constitution of the United States" is claimed in the amended complaint; nor considering it in view of the general demurrer, is it possible to deduce any issue whatever in respect to any such right from the complaint. This cannot be a case, then, arising under the Constitution. *Ansbro. v. United States,* 150 U. S. 695, supra. The question is thus narrowed to the claim that it is a case arising under the laws of the United States, and this is the claim made by counsel for plaintiff in error in Subdivision 4, page 12 of their brief.

As I understand the decision in *Bridge Proprietors v. Hoboken,* 1 Wall. 116, supra, its purpose was to announce a somewhat less rigid rule than some earlier decisions referred to in the opinion had laid down. But it is there held to be necessary "That the court must be able to see clearly, from the whole record that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error."

This degree of precision in pleading the facts on which the plaintiff relies in invoking the jurisdiction of the Court, is upheld by the decisions from which quotations are made above. It is noticeably enforced in *Gold Washing & Water Co. v. Keyes,* 96 U. S. 199, 201, where the petition for removal, referring to statutes much more specifically than is done in the complaint here, was reviewed and the Chief Justice said:

> "The statutes referred to contain many provisions; but the particular provision relied upon is nowhere indicated. A cause cannot be removed from a State court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States."

Looking at the facts stated in the amended complaint it is apparent that there is but the most general reference to the laws of Congress. The only specific reference to anything in the nature of a law is to Section 713 of the Postal Laws and Regulations of

the United States of the year 1893, which was alleged to be in words and figures, as follows, to-wit:

> "The railroad company will also be required to take the mails from and deliver them into all intermediate post offices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed."

Even so far as this is concerned, and much more with respect to the general reference to all the Postal laws of the United States, this complaint is obnoxious to the rules laid down by the court, for as said by Mr. Chief Justice Waite in the *Gold Washing & Water Company* case:

> "They also allege that the action arises under, and its determination will necessarily involve and require the construction of, the laws of the United States specifically enumerated, as well as the pre-emption laws. They state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes."

And again:

> "The immunities of the statutes are, in effect, conclusions of law from the existence of particular facts. Protection is not afforded to all under all circumstances. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough; for that is the precise question the court is called upon to determine."

Is it too much to say that it is quite impossible for the court, by an inspection of this complaint, to see clearly or otherwise that any title, right, privilege or immunity is asserted by the plaintiff under any law of Congress, or under all of them? Or is it possible for the court to discern that there is any question here which "really and substantially involves a dispute or controversy as to a right

which depends upon the construction of some law of the United States", or, in short, that this claim of negligence, and responsibility for negligence, can be determined for or against the plaintiff in error by the construction of any law of Congress brought to the attention of the Court by the complaint, or any other known to exist?

5. The rights which the plaintiff in error seeks by argument to deduce from the laws of Congress and the postal regulations are two. First, that the railroad company was carrying the mails under an obligation imposed by law, and not under a contract. Second, that the Court of Appeals and the Circuit Court alike were in error in holding that the night agent of the defendant at Harvey was an agent of the government because a postal regulation, which is not referred to in the complaint, provides that mail arriving at night shall be received by some suitable employe of the defendant and cared for during the night, and deposited in the post office in the morning, adding that such employe need not be sworn because he is not an employe of the United States. Counsel seeks to deduce from this postal regulation, which is not pleaded, not only a standard of care different from that imposed by the general law, but also a statutory determination of the question whether the night operator was an agent of the government or not. But none of these claims are apparent from the complaint itself, which was the measure of the jurisdiction of the Circuit Court. The only thing in the complaint, bearing upon either ground is the denial by the plaintiff in error of the existence of any contract between the defendant and the government with respect to the carrying of the mails. Of this it must be said that, considering the alllegations of the complaint without reference to this denial, in the light of the practice of the government from the beginning, of which the court will take notice, the clear inference to be drawn is that the service referred to was being rendered in pursuance of a contract. Indeed it is not too much to say that these allegations of the complaint give rise to a conclusive pre sumption of law that the services rendered were in pursuance of a contract. This is true because no mail was ever carried, in time of peace at least, in any other way. Even the land grant roads are carrying the mails in pursuance of contracts with the government, for by accepting their charters with the provisions

therein contained with reference to carrying the mails, they thereby entered into contracts with the government; for all time, it may be, but none the less contracts.

The Circuit Court said, in overruling the demurrer to the amended complaint:

> "The statement of fact is the same in substance as in the original complaint. The added statement that there was no contract between the United States and the defendant for the carriage of the mails is overborne by specific particular statements of fact showing the contrary." (Record, p. 43).

In addition to this, it must be said that this allegation is a mere conclusion of law, or the expression of opinion by the pleader as to the effect of the other allegations of the complaint. In this respect this allegation clearly violates the rule stated by Mr. Chief Justice Waite in *Gold Washing & Water Co. v. Keyes*:

> "The office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises."

It may also be observed that the slightest inspection of the postal laws of the United States will make it apparent that Congress never entertained the idea, which is advanced here, that the United States mails must be carried by the railroads in the same way that they must build fences under police regulation.

In *Price v. Railway Company*, 113 U. S. 218, where Section 4000 of the Revised Statutes, upon which counsel rely most, was pleaded and relied on, this Court assumed that the service was being rendered in pursuance of a contract. The suggestion of counsel in argument, or otherwise, contrary to the settled practice of the government from the beginning, cannot be considered as making a suit arising under the law of the United States. It was said by the Court in *Western Union Tel. Co. v. Ann Arbor Railroad Company*, 178 U. S. 239, 244, that a claim under a statute contrary to

the settled construction of the statute would not be recognized as a basis of jurisdiction. The only deduction to be made by the Court from this complaint is that the defendant was carrying the mail for the United States in pursuance of a contract, made conformably to the statutes and postal regulations of the United States; that by reason of some failure in performance of the duty imposed by that contract the plaintiff suffered a loss, for which he seeks compensation from the defendant under principles of general law.

POSTAL REGULATIONS ARE NOT "LAWS OF THE UNITED STATES."

6. Counsel for the plaintiff in error seem to claim that this is a suit arising "under the laws of the United States" because of the postal regulations referred to. Whatever the effect of those regulations might be, is it permissible to construe the words "laws of the United States" as used in the Judiciary Act, so as to embrace all the regulations of all the departments of government, including the rules of the courts? Are they "laws of the United States" in that sense? It would seem not because they are clearly distinguished from those laws as to their origin, scope and function. Rules and regulations of every department are administrative. They may be involved in litigation, as the decisions cited by counsel show, but no right or title can be derived thence. Would it not be a practical absurdity for one to assert title to lands derived through the rules and regulations made by the Secretary of the Interior? Certainly he must go deeper than that. It is impossible to suppose that such regulations can ever have the effect of conferring any "right, title, privilege or immunity" which may form the basis of the jurisdiction of the Circuit Court of the United States. Such must be traced to the Constitution or the acts of Congress. I have not found any warrant for this claim in the decisions cited by counsel. These regulations may well have sometimes and for certain purposes the force of law, without coming within the definition of laws of the United States, as used in the Judiciary Act. Certainly no case has been found where jurisdiction was based on such regulations.

But claims made in argument, of whatever value they may be, cannot be considered by the court on this question because the Cir-

cuit Court did not acquire jurisdiction on any such claims or grounds. *Loeb v. Columbia Township Trustees*, 179 U. S. 472; *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277; *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S. 290. By these decisions, as before stated, the consideration of the question must be confined to the complaint because upon that the Circuit Court acquired jurisdiction, and it has been held by this Court in other decisions that the record cannot be enlarged by argument for the purpose of making out a federal question which does not otherwise clearly appear. *St. Joseph v. Steele*, 167 U. S. 659. Citing *Hanford v. Davies*, 163 U. S. 273, 279.

7. There are many other cases arising out of the mail service in one way or another which come quite as close to presenting a federal question as this. There is a case now pending against this same defendant, in the district court of North Dakota, where the plaintiff charges negligence in the construction and maintenance of certain steps used to hang the mail sack on the mail crane at one of the stations in North Dakota, by reason of which the mail carrier, in the performance of his duty, was injured. There have been several cases founded on injuries caused by the discharge of mail sacks by mail agents while the train was in motion. There have been many cases growing out of injuries to railway mail clerks in collisions. Not long since an action arose in Wisconsin growing out of alleged negligence of the mail contractors in the City of Milwaukee, who undertook to carry mail from the post office to the railways. Incident to this duty was the carriage of the mail clerk. He received personal injuries by reason of the alleged failure of the contractors to furnish safe horses and driver. *Lawton v. Waite*, 103 Wis. 244. We might suppose cases arising from the negligent driving of the United States mail wagons through the streets of cities. The injuries forming the basis of such suits must be considered as growing out of the mail service, and incident to that service. All such cases stand as closely related to the Constitution and laws of the United States as does the case at bar. But that relation is remote and not immediate. In order to bring any case within the rules so clearly laid down by this Court in the decisions cited, the relation between the suit and the law or the Constitution must be direct and primary. Take for instance the case of *Teal v.*

Felton, 12 How. 284. There the postmaster, being charged with a wrong in that he refused to deliver a newspaper, justified his refusal by appealing to the act of Congress which made it unlawful to place upon any newspaper any writing other than the address. His defence was that this newspaper contained such writing. It is plain that upon the construction of that statute the case must turn for the plaintiff or the defendant. But suppose his defence had been simply a denial of the wrong charged upon him. The fact that he was a postmaster and that he held his office by virtue of the Constitution and laws of the United States would not affect the issue between the parties in the slightest degree. So, here, it is admitted, in fact the Court would take judicial notice of so open and notorious a fact, that the railroads of this country carrying the mail, are carrying it as an aid in the discharge of this great function of government, and so under the laws of the United States. But how does this affect the issue of negligence between the parties, or of rights under the contract?

8. But it may be said that the question of the relation of the defendant to the government, which was made one ground of the decision of the Circuit Court, and the only ground on which the Circuit Court of Appeals planted its decision, is a federal question, and therefore this is a suit arising under the Constitution or laws of the United States. But the plaintiff does not assert any right based upon the proposition that defendant in its capacity of mail carrier was an agency of government, and *for that reason* liable to it for the loss. On the contrary, it is apparent from the complaint that plaintiff relied wholly upon general principles of law covering actions in tort or for breach of contract. The plaintiff's case is as much based upon these general principles of law as if the suit were against an express company for the loss of a package of money. From an inspection of the complaint it cannot be said that this was one of the grounds upon which the Circuit Court acquired jurisdiction. Every averment of the complaint is to the contrary. This was the defendant's claim, made in its argument on the demurrer, and was adopted by the court in its decision, precisely as the defenses which involved the federal questions were projected into the case of *Loeb v. Columbia Township Trustees*, 179 U. S. 472.

But assume, for the argument's sake, that plaintiff in error has a right to rely upon this ground of the decision of the Circuit Court of Appeals. It must be asked, how does the decision of this question call for any construction or application of the Constitution or laws of the United States within the rules? Is there a real or substantial dispute as to the effect or construction of the Constitution or some law of the United States involved in the decision of this question? If so, of what clause of the Constitution or of what law of Congress? It is true that there would be no officer or agency of the federal government if there were no such government, and but for the Constitution there would not be. It is also self-evident that if the Constitution had not empowered Congress to establish post offices and post routes, or if Congress had made no laws in pursuance of that authority, the defendant could not have been employed as an agency of government. There is certainly no dispute between the parties as to this, and no amount of reflection or disertation of this sort could aid or hinder plaintiff's cause. Admit it all, as we must, and we are just as far removed from the real, substantial question as ever. The answer of the question raised by the defense cannot be deduced from federal law as such, but must be referred to the principles of general law, as applicable to one government as to another. The mere fact that the defendant was an officer or agent of the United States would have no weight in determining whether the suit was one arising under the law of Congress. It must be shown that the officer or agent claimed to be acting under the authority of a law of Congress. Such a case was *Teal v. Felton*, 12 How., 284. The defense of the postmaster was that he was acting under authority conferred by a specific law of Congress. Of course, that made a suit arising under the law of the United States. The same is true of the recent case of *School of Magnetic Healing v. McAulty*, 187 U. S. 94.

AUTHORITIES CITED BY COUNSEL FOR PLAINTIFF IN ERROR IN SUPPORT OF JURISDICTION.

(Their Brief, p. 15).

I will briefly review the authorities cited in support of the jurisdiction claimed here.

Howard v. United States for the use of Stewart, 184 U. S. 676,

was an action brought on the official bond of the Clerk of a United States court, to recover for default of duty of the clerk. It was held that because the bond was taken by the Circuit Court in conformity with the Statutes of the United States, and because the case depended on the scope and effect of the bond and the meaning of those statutes, therefore it was a suit arising under the laws of the United States.

In this case the court followed *Freibleman v. Packard*, 109 U. S. 421, 423, which was a suit on the official bond of a United States Marshal. There could not possibly be any suit arising more directly under the laws of the United States than this class of cases.

In *Robinson & Co. v. Belt*, 187 U. S. 41, no question of jurisdiction was raised or decided; nor in *Studebaker v. Perry*, 184 U. S. 258; nor in *Marande v. Texas Pacific Ry.*, 184 U. S 173. In the latter case the defendant was organized under an act of Congress. Of the same nature are *Amato v. Railway*, 144 U. S. 465, and *Railway v. Harris*, 158 U. S. 326. In these cases the court followed the *Railroad Removal Cases*, 115 U. S. 1, where the question was fully considered.

Bolles v. Outing Co., 175 U. S. 262, was an action to recover a penalty given under the copyright law, Revised Statutes, Section 4965. No question of jurisdiction was raised. *Brady v. Daly*, 175 U. S. 148, is like the last case referred to, brought under Section 4966 of the Revised Statutes. In this suit, like those on the official bonds, the plaintiff traced his right and title directly to a specific statute.

In *Auten v. United States National Bank*, 174 U. S. 125, 141, jurisdiction was upheld because a receiver of a national bank is an officer of the United States; so decided *In Re Chetwood*, 165 U. S. 443. For this reason it was held that a suit against him was one "arising under the laws of the United States." This decision was planted upon the same reason as *Sonnetheil v. Brewing Co.*, 172 U. S. 401, 404, which was a suit against the United States Marshal for acts done in his official capacity. Within the rule laid down by the Court it would seem that the question of jurisdiction is not finally settled by showing that the defendant is in fact an officer of the United States. The suit must be predicated upon some omission of duty which calls for a construction and application

of the statutes which define the official duty of every officer of the United States. The jurisdiction in every case must be decided by the well established principles laid down by the Court.

It was suggested in *Sonnethiel v. Brewing Co.* that if suits against corporations chartered by the Congress are suits arising under the laws of the United States, that with greater reason must it be considered that a suit against a marshal of the United States, not simply as marshal but for acts done in his official capacity, falls within the same category. It is not permitted us to question the authority of the decision in the *Railroad Removal Cases,* but it may be consistent with propriety to suggest that those cases are *sui generis* and that all other cases should be decided by the rules firmly established by the Court, and that those rules ought not to be satisfied by simply referring to the *Railway Removal Cases* as a precedent in support of the jurisdiction asserted under such facts as are presented by the case at bar, or any like case. It is perfectly competent for the Congress in creating a railway, bank or other corporation to provide the jurisdiction in which it may sue or be sued as such, as it was provided in the act creating the United States Bank, for that bank had the right to sue in the United States Courts expressly given by the act creating it, and it was not necessary to consider its status under general principles. Under the Act of March 3, 1875, the Circuit Courts of the United States were given jurisdiction over all suits by or against National Banks, but by Section 4 of the Act of March 3, 1887, such banks are made citizens of the states in which they are located and the jurisdiction of the United States courts is limited to such as they would have over suits between individual citizens of the same state.

The reasoning in the *Removal Cases,* in short, is this: the corporation derives its being from the United States Statutes and, therefore, every suit by or against it must be a suit "arising under the law of the United States," although the only issue between the parties is one of common law negligence, as in the case of *Amato v. Railway,* 144 U. S. 465.

The paintiff in error here, in a loose sort of a way, relies upon the same reasoning, but the decisions are not close enough to serve as precedents and it must be said, with all due respect, that the reasoning upon which they are based seems to be out of harmony

with the well settled principles of construction now so firmly settled by the decisions cited and quoted from *supra*, and that it ought not be extended to any new class of cases in which the relation between the suit and the law of Congress is remote and not direct.

In *McFadden v. Evans, Snider, Buel Co.*, 185 U. S. 505, there was no question of jurisdiction.

It must be said that the cases cited, as a whole, make it quite plain that the case at bar cannot properly be included among them as a like case, but must be referred to the class of cases considered *supra*, where the jurisdiction of the court was denied.

CONCLUSION.

9. In conclusion it is to be observed that not every suit which springs out of facts related to the authority of the United States or to the Constitution or laws thereof, regardless of the nature of that relation, may be said to be a suit arising under the Constitution or laws of the United States. As for example, *Metcalf v. Watertown*, 128 U. S. 586, where it was held that a suit brought to recover a judgment of a United States court does not come within its jurisdiction; *Mail Company v. Flanders*, 12 Wall. 130, a suit instituted in the Circuit Court of the United States growing out of the sale of a vessel captured within the Confederate lines and sold under the "Captured Property Act" during our Civil War. It was claimed by the defendant that the Court had no jurisdiction because the Court of Claims had exclusive jurisdiction under the act of Congress, but this Court, referring to the question of jurisdiction, said:

> "Captured as the steamer Laurel Hill was, within the military lines of the Confederate army, the proclamation of our commanding general, before referred to, afforded no support to that part of the claim of the complainants, but the presiding justice being of the opinion that the Circuit Court had no jurisdiction of the case, did not examine the merits of the controversy. Both parties, as appears on the face of the pleadings, are citizens of the same State, and upon that ground this Court is of the opin-

ion that the bill of complaint was properly dismissed for want of jurisdiction."

Albright v. Teas, 106 U. S. 613, where it was held that the court had no jurisdiction in a suit to collect a consideration for the transfer of a patent, and of the same import is *Hartzell v. Tilghmann,* 99 U. S. 547; or in a similar suit as to copyright, *Little v. Hall,* 18 How. 165; *St. Joseph etc., Ry. v. Steele,* 167 U. S. 659, where the question involved the taxes on a bridge built under the authority of an act of Congress, no federal question was involved because it was not claimed that the plaintiff was entitled to an exemption under the act of Congress so authorizing the building of the bridge. The case already cited and frequently referred to, *Gold Washing & Water Co. v. Keyes,* 96 U. S. 199, is a case clearly belonging to this class.

This question was most thoroughly considered by the Court in *Blackburn v. Portland Gold Mining Co.,* 175 U. S. 571, and in *Shoshone Mining Co. v. Rutter,* 177 U. S. 505, in which most, if not all, the cases applicable are reviewed, and it was there decided that suits apparently having a much more direct relation to the laws of Congress than the case at bar were not suits arising under those laws within the settled rules of construction.

In *Western Union Telegraph Company v. Ann Arbor R. R. Co.,* 178 U. S. 239, a suit for the specific performance by defendant of a contract made with its predecessor under which plaintiff claimed certain rights covering the operation of its telegraph line on the railroad property, it was alleged in the bill as follows:

"Your orator is now and long has been doing an extensive telegraph business in many parts of the United States. On January 7, 1867, it filed with the Postmaster General its acceptance of the provisions of the act of the United States, passed July 24, 1866.

"7th. It avers that the provisions of the contract with said Frankfort and South Eastern Railroad Company are binding on said Ann Arbor Company, and that independent of said contract it has a right to maintain its telegraph line on what was formerly said Frankfort and South Eastern Railroad under the provisions of the

statute of the United States." (178 U. S. pp. 240-241).

It was claimed by the defendant that these facts made the suit one "arising under the laws of the United States" and this view was taken by the Circuit Court and Circuit Court of Appeals, but this Court held that the averments of the bill were insufficient.

In *Gableman v. Peoria, etc. Ry. Co.*, 179 U. S. 335, the question was presented whether a receiver, solely because he was appointed by the Federal court, had a right to remove a suit brought against him as one "under the constitution or laws of the United States." This court answered that question in the negative on the authority of *Bausman v. Dixon*, 173 U. S. 113; *Pope v. Railway Company*, 173 U. S. 573; *McKenna v. Simpson*, 129 U. S. 506; *Provident Savings Society v. Ford*, 114 U. S. 635.

The only case growing out of the mail service of a similar nature is that of *Price v. Railway Co.*, 113 U. S. 218, which was to recover for the death of a railway mail clerk while on duty. It was there contended on behalf of the plaintiff that the statutes of the United States under which it was claimed the clerk was rightfully on the train in the discharge of his duty, furnished the basis for the jurisdiction of this Court, but it was held that there was no federal question involved and the writ of error was dismissed. Mr. Justice Miller, delivering the opinion of the Court, used this language:

> "The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge, nor does the fact that he is in the employment of the United States, and that the defendant is bound by contract with the government to carry him, affect the question. It would be just the same if the Company had contracted with any other person who had charge of freight on the train to carry him without additional compensation. The statutes of the United States which authorize this employment and direct this service do not, therefore, make the person so engaged a passenger, or deprive him of that char-

> acter in construing the Pennsylvania statute. Nor does it give to persons so employed any right as against the railroad company, which would not belong to any other person in a similar employment, by others than the United States. We are, therefore, of opinion that no question of federal authority was involved in the judgment of the Supreme Court of Pennsylvania, and the writ of error is accordingly dismissed."

It would seem, therefore, that this is not a suit arising under the Constitution or laws of the United States, and that this Court is without jurisdiction to review the decision of the Circuit Court of Appeals.

II.

THE MERITS OF THE CASE.

1. Prior to this suit and another like it recently decided by the Supreme Court of Iowa, to which reference will be made hereafter, there had been but few cases in the courts involving the liability of carriers of the mail, and but one in which a railway company was defendant, so far as I know.

Central R. Co. of Ga. v. Lampley, 76 Ala. 357.

Prior to this there were two decisions taking quite opposite views on the question involved. The first case was

Conwell v. Voorhees, 13 Ohio 523,

which was very ably argued by counsel, as shown by their briefs in the reported case. There the suit was brought against the mail contractor to recover for the loss of a package containing bank bills, through the alleged negligence of the mail driver. It was decided that the contractor was a public agent, and as such not liable, except for his own neglect.

Sawyer v. Corse, 17 Gratt. 230, involved precisely the same question, and the court came to the opposite conclusion—that the con-

tractor was not a public agent and was liable for the negligence of his driver.

The Ohio decision was followed in *Hutchins v. Brackett*, 22 N. H. 252, and the Virginia case in *Railway Company v. Lampley*, 76 Ala. 357, *supra*. The Ohio case was cited with approval in *Robertson v. Sichel*, 127 U. S. 508, in support of the non-liability of the collector of New York for the negligence of a subordinate.

The Supreme Court of Mississippi in *Foster vs. Meets*, 55 Miss. 77, upholds the doctrine of *Conwell vs. Voorhees*.

The first duty devolving upon the court, then, is to decide the legal status of the defendant as carrier of the mail. It is not held anywhere, I believe, that it is a common carrier, or can be charged as such.

The Virginia court says it is not a public agent, but still holds it charged with a public duty and liable to anyone of the public interested in the due performance of that duty. There is no difference between the claim of the paintiff in that case, and that of the suitors in the cases against postmasters. The postmaster is charged by reason of his official position, to perform certain duties to the public, and if he fails through his own negligence and a loss occurs, he is liable.

1 *Redfield on Negligence*, Sec. 321;
Angell on Carriers, Sec. 119;
Cooley on Torts, p. 458, 2nd Ed. 391, 1st Ed.;
Teal vs. Felton, 1 N. Y. (Comstock), 537;
S. C. Affirmed, 12 How. 136.

But postmasters are not liable for the negligence of assistants and clerks.

Keenan vs. Southworth, 110 Mass. 474;
Wiggins vs. Hathaway, 6 Barber 632;
Schafer vs. Lynch, 8 Watts 453;
Bolan vs. Williamson, 2 Bay 551, So. Carolina.

The following cases,

Bishop vs. Williamson, 11 Me. 495;
Churtz vs. Smith, 23 Vt. 663;
Colman vs. Frazier, 4 Richardson (So. Carolina)

seem to hold the postmaster liable for the negligence of an assistant or clerk, simply because the clerk was not sworn. But how the clerk could be held to be more or less a servant of the postmaster by the oath, I cannot perceive. This seems to have been expressly repudiated in one part of the opinion, in *Sawyer vs. Corse, supra,* but is recognized in another as of some moment. It must be admitted that the fact of an oath seems to be of consequence in *Keenan vs. Southworth,* and *Schafer vs. Lynch, supra.* But the paramount consideration stated in *Robertson vs. Sichel,* 127 U. S. 508, that it would be against public policy to hold a public official responsible for anything but his own act, would seem to eliminate the fact of an oath as controlling. Of course, if it can be shown that the absence of an oath was the proximate cause of the loss, then the officer would be charged for his personal fault in not having the clerk sworn. But courts must have an exaggerated view of the efficacy of an oath, to go upon any such theory,—especially to hold it conclusive evidence of negligence. The general object of an oath is to furnish a basis for penalties for a breach of duty. I am not aware that there is any penalty or punishment prescribed by statute for mere negligence. The Post Office Department has the power to impose fines on carriers of the mails for non-performance, such as delays, etc., and it may be that for any breach of the contract of carriage it could impose a suitable fine. But this method of discipline could not be affected by the absence of an oath.

By Act of June 8, 1872, it is provided that "Every person employed in the postal service shall be subject to all penalties and forfeitures for violation of the laws relating to such service whether he has taken the oath of office or not." Section 3832, U. S. Compiled Stat. 1901.

In *United States vs. Bellow,* 2 Brock. 280 (24 Fed. Cases, p. 1079, Case No. 14,563), it was held by Chief Justice Marshall, that any person engaged in carrying the mails or in caring for them is subject to all penalties for a breach of duty required of him, whether sworn or not.

Every person who undertakes to carry the mail, or to be custodian of it, thereby becomes *de facto* an agent of Government. Such seems to be the basis for the act of Congress quoted *supra* and more plainly of the following—from the same act. "Any person who

shall have taken charge of the mail and shall voluntarily quit or desert the same before he has delivered it into the postoffice at the termination of the route, or to some known mail-carrier, messenger, agent, or other employe of the Postoffice Department authorized to receive the same, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not less than three months, nor more than one year."

So it must be assumed that every act in furtherance of the service is in reality an act of government; that the mail never leaves the possession of the government, and that all those who perform any duty with reference to it are agents of the government. Therefore, as held by the court below, "Carriers of whatever kind are the servants of the government—the hands which it employs in the performance of its functions." The position of the carrier, then, is analogous to that of the public official engaged in the mail service.

This question was considered by the learned Circuit Judge, whose opinion is in the record, pages 26-30. The reasoning of that opinion is very cogent, and much more satisfactory from the standpoint of public policy than the Virginia case, *Sawyer vs. Corse*, so much relied upon. The Circuit Court of Appeals adopted the views of the Circuit Court on this point and elaborated the reasoning. And the first important question is whether this Court will adopt the reasoning of the Virginia Court, followed by the Supreme Court of Alabama in *Railroad vs. Lampley*, or adopt the reasoning of the courts below, supported by *Conwell vs. Voorhees*, 13 Ohio, 523, *Hutchins vs. Brackett*, 22 N. H. 252, *Foster vs. Meets*, 55 Miss. 77, and the case of *Boston Insurance Company, vs. Chicago, Rock Island & Pacific Railway Company*, decided by the Supreme Court of Iowa since the decisions of the courts below in the case at bar, and reported in 92 N. W. Rep. 88.

This was a case precisely like the case at bar, so far as legal positions are concerned. The only difference in fact is that the registered package of money was lost by a fire caused by the alleged negligence of the railway employes. The defendant interposed a general demurrer to the complaint which was sustained by the trial court, and its decision was affirmed by the Supreme Court, in a very thorough and clear opinion. One of the grounds of the deci-

sion is the same as that of the Circuit Court of Appeals in this case, and upon substantially the same reasoning.

It is claimed by counsel in their brief, page 12, that in holding that the night operator as custodian of the mails under Section 713 of the Postal Regulations was an agent of government, the Circuit Court of Appeals disregarded the provision in that section that persons employed by the railroad companies to perform such service "Are agents of the companies and not employes of such service." It is true the night operator was not an employe of the government in the ordinary sense, and it is true in one sense that he was the agent of the defendant as well as its employe. But properly construed, does the regulation exclude the view of the court below that he was also the agent of the government? There would seem to be no reason why such a construction should be placed upon the regulation. But, however that may be, the determination of that question is judicial and not departmental. The courts must be free to decide it upon the principles of law applicable to it without embarrassment from this regulation, because all such regulations in their scope and effect are limited by law.

In this connection it is important to consider the decision of this Court in *Robertson vs. Sichel*, 127 U. S. 507. In principle it would be as much against the interests of the public service to uphold such actions as this as that against the collector. It is not too much to say that no railway company would undertake such a service on the same terms with such an additional burden of responsibility. They would practically stand back of such insurance companies as the plaintiff in error, and this would be an added inducement to a greatly increased use of the mails for transmitting money in large amounts. There would be no end of opportunity for fraudulent cases against the companies. They would never know the extent of their liability—only the sender would have that knowledge. The government itself is ignorant of the amount of money in any case. It may be a hundred one dollar bills, or a hundred fifty or one hundred dollar bills or larger. The government assumes no responsibility for its safety and cannot be held liable, for the reasons stated in *Robertson vs. Sichel*. But why should the government impose such a liability on its agents, especially under such conditions as exist here? There would be a multitude of claims and suits by private persons losing letters. They

need not be registered. In most of the cases cited supra they were not. It would only be necessary to prove that a letter was probably in the mail stolen or otherwise lost through any act of negligence, and no one could dispute the plaintiff as to the money enclosed. These considerations should have weight because the carrier must of necessity demand greater compensation than at present if such a liability is to be imposed. It would be contrary to sound principles of business and justice to refuse to pay more; and the added burden ultimately would be on the government, as it should be. Moreover the carrier would be entitled to know when money was to be sent and in what amounts, so that it could regulate its charges. If the courts are to impose the liability of express companies for moneys and other valuables lost in transporting the mails, then it follows as a business corrolary that the carrier will no longer consent to carry the mails blindly, but will demand that the system be changed so as to afford the protection which express companies have from knowledge. The use of the mails for transmitting large sums of money would become highly detrimental to the service. Nothing would be more wholesome than an act of Congress forbidding the sending of money by registered mail except in very limited amounts, and to and from non-money order offices only. It would remove practically the only serious menace to the mails from robbery and theft. It would make for the integrity of the service. Certainly if the court has any choice of positions these considerations of public policy should have weight. For it is not too much to say that the success of plaintiff in error here would be a positive injury to the mail service of the United States in every aspect. These considerations of public policy are equally applicable in the determination of the question which follows.

2. There was no relation existing between the parties which gave a right of action to the plaintiff against the defendant on the facts alleged.

In the arguments before the courts below there was a wide divergence of view between the parties to this controversy, as to the source of the obligation of the defendant in error, relative to the carriage of the mail. The plaintiff in error asserted that the obligation was imposed by law. The defendant in error claimed that it sprang from a contract between the government and itself. To

maintain its position the plaintiff in error relied upon the provision of the Constitution authorizing Congress to establish postoffices and post-roads, and certain provisions from acts of Congress and postal regulations relative to post-roads and carriage of the mail. Counsel claimed in substance, that the power conferred on Congress, to establish post-roads, carried with it the power to compel railway companies to carry the mail against their consent and at whatever compensation Congress or the postmaster-general might provide. It is not too much to say that if such a power exists as to railway companies using railways established as post-roads by act of Congress, it exists also as to everyone using any post-road, especially to all stage coaches and other public conveyances. The same act which declares that all railroads are established post-roads, also declares that all the waters of the United States, all canals and plank roads and other designated roads, shall be established post-roads, so long as the mail continues to be carried thereon. Also all letter carrier routes in free delivery towns and cities—R. S. 1878, Sec, 3964. By the act of March 1st, 1884, all public roads and highways, while kept up and maintained as such, are declared to be post-roads. (23 Stat. L. 3, Vol. 1, Supplement R. S. 2 Ed., page 423.)

No one could claim that a railroad is any more a public highway than the navigable waters and other highways, or that it is any more a post-road than they are. Therefore, whoever uses any highway which is a post-route or road, shall, if Congress so enacts, carry the mail, and for such compensation as Congress, or the postmaster-general shall allow. We must beg leave of counsel to dissent from their view of this clause of the Constitution. Potent as it is, it hardly furnishes authority for such an exercise of arbitrary power.

The argument of counsel would of necessity include a like power with respect to establishing postoffices. They must be built as well as established; operated as well as built. And can contractors and builders, postmasters and subordinates be impressed into service against their will, and have their compensation fixed by the postmaster-general? This provision of the Constitution cannot be so construed as to warrant any such legislation as claimed by counsel.

But we are not called upon to consider so grave a question as the validity of the exercise by Congress of such an assumed power because Congress has not used it.

An examination of the statutes will make it plain that counsel have been misled. After designating post-roads, or what shall be post-roads, the Revised Statutes provide as follows: Sec. 3965, "The postmaster-general shall provide for carrying the mail on all post-roads established by law, as often as he, having due regard of productiveness and other circumstances, may think proper." That authority is just as far-reaching to-day as it was when enacted. Shall he provide it by exercising a power exceeding that of the Czar of Russia? Manifestly not; he must proceed by the only rational method—through contracts.

Following this section are numerous provisions governing contracts for carrying the mails, and laying down specific rules and regulations for the postmaster-general in carrying out the broad power conferred upon him by Section 3965.

Chapter 10 of the Revised Statutes, beginning at page 777, is devoted to railway service exclusively, and is as follows:

> "Sec. 3997. The postmaster-general shall arrange the railway routes on which the mail is carried, including those in which the service is partly by railway and partly by steamboat, into three classes, according to the size of the mails, the speed at which they are carried, and the frequency and importance of the service, so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed.
>
> "Sec. 3998. The pay for carrying the mail on any railway of the first class shall not exceed three hundred dollars per mile per annum; on any railway of the second class it shall not exceed one hundred dollars per mile per annum; and on any railway of the third class it shall not exceed fifty dollars per mile per annum; but if one-half of the service of any railway is required to be performed in the night time, the postmaster-general may pay twenty-five per centum in addition to the above maximum rates.
>
> "Sec. 3999. If the postmaster-general is unable to contract for carrying the mail on any railway route at a compensation not exceeding the maximum rates herein provided, or for what

he may deem a reasonable and fair compensation, he may separate the letter mail from the other mail, and contract, either with or without advertising, for carrying such letter mail by horse, express or otherwise, at the greatest speed that can reasonably be obtained, and for carrying the other mail in wagons, or otherwise, at a lower rate of speed.

"Sec. 4000. Every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same.

"Sec. 4001. All railway companies to which the United States have furnished aid by grants of land, right of way, or otherwise, shall carry the mail at such prices as Congress may by law provide; and until such price is fixed by law, the pastmaster-general may fix the rate of compensation.

"Sec. 4002. The postmaster-general is authorized and directed to adjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned:

"First. That the mails shall be conveyed with due frequency and speed, and that sufficient and suitable room, fixtures and furniture, in a car properly lighted and warmed, shall be provided for route-agents to accompany and distribute the mails.

"Second. That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two hundred pounds,

the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the postmaster-general may direct.

"Sec. 4003. In case any railway company now furnishing railway postoffice cars shall refuse to provide such cars, such company shall not be entitled to any increase of compensation under the provision of the next section.

"Sec. 4004. Additional pay may be allowed for every line comprising a daily trip each way, of railway postoffice cars, at a rate not exceeding twenty-five dollars per mile per annum for cars forty feet in length; and thirty dollars per mile per annum for forty-five foot cars; and forty dollars per mile per annum for fifty-foot cars; and fifty dollars per mile per annum for forty-five to sixty-foot cars.

"Sec. 4005. The length of the cars required for such postoffice railway car service shall be determined by the postoffice department, and all such cars shall be properly fitted up, furnished, warmed, and lighted for the accommodation of clerks to accompany and distribute the mails."

Section 3999 completely refutes the construction put on Section 4000 that the defendant in error was bound to carry the mail, contract or no contract. If the position of counsel were true, a refusal by the company, to carry on the terms prescribed by the postmaster-general, would be met by a peremptory writ of mandamus from a federal court, not by horse carriage. It is manifestly impossible to suppose that Congress intended to enact Section 4000 with a construction placed on it by the English Courts inconsistent with the act of Congress as a whole, as claimed by counsel on pages 24-26 of their brief.

There is an allegation in the amended complaint, found at page 32, folio 53, of the printed record, that during all of the period re-

ferred to there was no contract of any kind between the defendant and the United States, concerning or providing for the carriage by the defendant of said mail, or any part thereof, or of the person in charge of said mail, upon or along its said line of railway, or any part thereof. The Circuit Court, in sustaining the demurrer to the amended complaint, said of this new allegation that it was overborne by specific statements of facts, showing the contrary. It is also a mere conclusion contrary to the statutes. For it must be presumed that the postmaster-general has acted in accordance wih the statutes, and entered into contract relations with this railway company for the carriage of the mail because there is no other way provided in the statutes. The method of making the contract is wholly immaterial.

The following cases clearly sustain this view:

Jacksonville Ry. vs. United States, 118 U. S. 626;
Railway Company vs. United States, 118 U. S. 235;
United States vs. Alabama Ry. Co., 142 U. S. 615;
Eastern Ry Co. vs. United States, 129 U. S. 391;
Minnesota Ry. Co. vs. United States, 24 Ct. Claims 350;
Texas & Pacific Ry. Co. vs. United States, 29 Ct. Claims 379;
Price vs. Railway, 113 U. S. 218.

We reach the conclusion, therefore, that the duty to carry is one arising out of contract, and not one imposed by law.

As an incident of that contract, the defendant was required to receive the mail pouch at Harvey and deliver the same into the postoffice. It was also its duty, as an incident of the contract, to take reasonable care of the pouch, to protect it and its contents from loss or injury while in its possession. There is nothing in this complaint which charges anything but a breach of this contract. So whether the defendant was a public agent in the performance of a public duty, answerable only for its own negligence, or was acting purely in a contract relation with the government, it was answerable to the government alone for any breach of its contract—certainly not to the plaintiff, who stands in no relation of privity to it.

National Bank vs. Grand Lodge, 98 U. S. 123;
Kellar vs. Ashford, 133 U. S. 610;
Constable vs. National S. S. Co., 154 U. S. 51;
Electric Co. vs. U. S. Fidelity Co., 85 N. W. 648-650; Wis
Vrooman vs. Turner, 69 N. Y. 280;
Burton vs. Larkin, 13 Pacific Rep. 397-8 (Kansas);
Parker vs. Jeffrey, 37 Pac. Rep. (Ore.) 712;
Thomas Co. vs. Bathe, 44 S. W. (Ore.) 218;
Anderson vs. Fitzgerald, 21 Fed. Rep. 297;
Austin vs. Seligman, 18 Fed. Rep., 519;
Montgomery vs. Spencer, 50 Pac. Rep. (Utah) 623;
Wright vs. Terry, 2 S. Rep. (Fla.) 6;
Jefferson vs. Asch, 53 Minn. 446;
Germania Savings Bank vs. N. W. Motor & Light Co., 104 Iowa 717.

The foregoing cases are cited to the general principles governing the right of a stranger to a contract to bring an action on the ground that he is a beneficiary under it.

In *National Bank vs. Grand Lodge*, 98 U. S. 123-124, this court, referring to the contract between the Masonic Hall Association and the Grand Lodge, said: "It was a contract made for the benefit of the association and of the Grand Lodge,—made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have in an agreement by which the lodge should undertake to lend money to the association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's

hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now."

This case is cited in *Kellar vs. Ashford*, 133 U. S. 610; in *Johns vs. Wilson*, 180 U. S. 440, and in *Constable vs. National S. S. Co.*, 154 U. S. 51. The latter case was an action to recover for the loss by fire of certain merchandise on the docks at New York, which had been delivered under a rule established by the Collector of Customs which in terms bound the Steamship Company to pay the consignees the value of a cargo so placed on the wharf if burned, etc., and reliance was had upon this provision in the rules of the port. This court said with reference to the action, page 73: "It is by no means a universal rule that a person may sue upon a contract made for his benefit, to which he was not a party." The right of the plaintiff to rely upon such a provision was denied.

In *Austin vs. Seligman*, 18 Fed. 519, 522, Judge Wallace, rendering the decision, said: "According to good sense and upon principle there is no reason why a person may not maintain an action upon a contract, although not a party to it, *when the parties to the contract intend tha he may do so.*" And again: "If the parties choose to treat him as a primary party in interest, they recognize him as a privy to the consideration and promise. And the result of the better considered decisions is that a third person may enforce a contract made by others for his benefit, whenever it is manifest

from the nature of the agreement *that the parties intended to treat him as the person primarily interested."*

> "The cases of *Hendricks vs. Lindsay* (93 U. S. 143) and *National Bank vs. Grand Lodge* (98 U. S. 123) and the expressions in the opinions do not antagonize upon this proposition but accord with it. The language of Folger, J., in *Simson vs. Brown,* 68 N. Y. 355, may be adopted as a correct and accurate statement of the law, as follows: 'It is not every promise made by one to another from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit *as its object,* and he must be the party intended to be benefited.' "

Within these principles the right to maintain the action in that case was denied.

In *Anderson vs. Fitzgerald,* 21 Fed. 297, after a discussion of the principles governing such cases by Judge Love, of the Iowa District Court, the right of the sub-contractor for building of a railroad to sue on the contract between the Company and the principal contractor was denied, although it contained provisions which would inure to his benefit, the Court distinctly following *National Bank vs. Grand Lodge, supra.*

In the case of *Vrooman vs. Turner,* 69 N. Y. 280, which is a case frequently cited, there is a very full discussion of the subject, also in many other cases cited supra, but it is not considered necessary to more than refer to them. It is safe to say, however, that in none of them is there any warrant whatever for the claim put forward here by the plaintiff in error.

I desire to call the special attention of the court to a series of cases growing out of the loss of property by the failure of waterworks companies to keep their agreement with the municipalities to furnish water for putting out fires, which seem to be more closely analogous to the case at bar than any others.

Davis vs. Clinton Water Works Co., 54 Iowa 59;
Becker vs. Keokuk Water Wors, 79 Iowa 419;
Howsman vs. Trenton Water Works Co., 24 S. W. (Mo.) 784;
Mott vs. Cherryvale Water Co., 48 Kan. 12; 28 Pac. Rep. 989;
Fitch vs. Seymour Water Co., 37 N. E. Rep. 982;
Fowler vs. Athens Water Co., 83 Ga. 219; 9 S. E. Rep. 673;
Ferris vs. Carson Water Co., 16 Nev. 444;
Britton vs. Water Works Co., 81 Wis. 48;
Boston Safe Deposit Co. vs. Salem, 94 Fed. Rep. 238.

Davis vs. Clinton Water Works Co., 54 Iowa, 59, was an action to recover the value of certain buildings destroyed by fire upon the ground that the defendant was bound by contract with the city of Clinton to supply water to be used in extinguishing fires and failed to perform its obligation in this respect which resulted in the destruction of plaintiff's property. It was alleged in the petition that the buildings were burned because the necessary supply of water was not furnished by the defendant, and a sufficient pressure of water was not found at the hydrants contiguous to the buildings, which was caused by defective machinery and the negligence of defendant's servants. A demurrer to the petition was overruled and the defendant appealed. In passing upon this question the court said:

> "The petition does not allege or show any privity of contract between plaintiff and defendant. The plaintiff is a stranger, and the mere fact that she may find benefits therefrom by the protection of her property, in common with all other persons whose property is similarly situated, does not make her a party to the contract, or create a privity between her and de-defendant.
>
> "It is a rule of law, familiar to the profession, that a privity of contract must exist between the parties to an action upon a contract. One whom the law regards as a stranger to the contract cannot maintain an action thereon. The rule is founded upon the plainest reasons. The contracting parties control all interests, and are entitled to all rights secured by the contract. If

mere strangers may enforce the contract by actions, on the ground of benefits flowing therefrom to them, there would be no certain limit to the number and character of actions which would be brought thereon. Exceptions to this rule exist, which must not be regarded as abrogating the rule itself. Thus, if one under a contract receives goods or property to which another, not a party to the contract, is entitled, he may maintain an action therefor. So the sole beneficiary of a contract may maintain an action to recover property or money to which he is entitled thereunder. In these cases the law implies a promise on the part of the one holding the money or property to account therefor to the beneficiary. Other exceptions to the rule resting upon similar principles, may exist. See *National Bank vs. Grand Lodge*, 98 U. S. 123.

"The case before us is not an exception to the rule we have stated. The city, in exercise of its lawful authority, to protect the property of the people, may cause water to be supplied for extinguishing fires and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. The plaintiff receives benefits from the water thus supplied in common with all the people of the city. These benefits she receives just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace and order enforced by police regulation, and the like.

"It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order, are liable to a citizen for loss or damage sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers

and agents of the government. They cannot hold such officers and agents liable upon contracts between them and the city."

The Davis case was followed in *Becker vs. Keokuk Water Works*, 79 Iowa, 419, in which it was said:

> "The demurrer contains several grounds, only one of which, however, is so fully set out as to require examination. That is, in substance, that the petition fails to show a privity of contract between plaintiff and defendant. The chief question raised by the demurrer was considered in *Davis vs. Water Works Co.*, 54 Iowa, 59, and decided adversely to the claim now made by plaintiff. But he contends that this case differs from that in several material particulars. In this case a special fund was raised by the city to pay for a sufficient supply of water for use in case of fire, and to that fund plaintiff contributed. It is said that in making the contract, and in levying and collecting the taxes required by its provisions, the city acted as a mere agent. We do not think the fact that the city levies and collects a tax to be paid to defendant creates any privity of interest between defendant and the taxpayers. In making the contract, the city discharged one of the duties for which it was created; and in raising the required money it only provided the consideration due from it by virtue of the contract. It will hardly be claimed that defendant could proceed against the taxpayers, in the first instance, for any unpaid money due under the contract from the city."

The case of *Howsman vs. Trenton Water Works Co.*, 24 S. W. (Mo.), 784-786, was an action begun by a property owner against the water company for damages in failure to furnish water under a contract with the city, by reason of which the plaintiff's property was destroyed. In passing upon the company's liability under its contract with the city, the court said:

> "The case in hand is on the contract made by the water company with the town of Trenton, and

> the only feature that it presents that can take it out of the principle of law contained in these cases is, that provision was made in this contract for a special tax to be raised to provide part of the consideration the water company was to and did receive to which the plaintiff contributed, and an express promise contained in the contract that 'should said water company from lack of water supply or any other cause, except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect,' the argument being that here is an express promise of indemnity in a contract to which the plaintiff is privy to the consideration at least."

After reviewing the authorities, the court continued:

> "The town of Trenton under its charter has power to pass ordinances to prevent and extinguish fires, and, as incident thereto, power to contract for a supply of water for that purpose, but it would seem under the authorities cited, the plaintiff cannot maintain this action for cogent reasons which have been and may be put in several ways.
>
> "First. Although it was within the power of the town by contract to supply water for the purpose of extinguishing fires, it did not owe the duty of extinguishing fires to the plaintiff; consequently, the case is not brought within the line of adjudicated cases which maintain an exception to the rule that suit upon a contract must be brought by a party to the contract in cases where the promisee owed a duty to the third party which the promisor undertook to perform.
>
> "Second. A municipal corporation, in making contracts for the benefit of its citizens, acts for them collectively and for all of them in every act, and the relation of privity is not and cannot be introduced into such contracts by reason of tax paying or the discharge of any civic duty by any individual citizen.

"Third. The benefit to be conferred upon the individual citizen by the contract is incidental to the contract, the primary object of which is the benefit of all the citizens in their corporate capacity.

"Fourth. It does not clearly appear that the benefit was intended for the citizens in their individual capacity, but may have been intended for the protection of the municipality, and in the absence of the express power in the municipality to make contracts for the indemnity of its individual citizens should be so construed.

"Fifth. The relation that the contractor sustained to the town was that of its agent or servant to carry out the obligation of the contract upon its part for the benefit of all the citizens of the municipality, and for the enforcement of the terms thereof the citizens must look to the authorities of the city and cannot individually maintain an action for breach of the contract.

"Sixth. The town has no authority to make a contract to indemnify the plaintiff for the loss of his property by fire resulting from the neglect of its agents or servants to furnish an adequate supply of water to put it out, and therefore could not make such a contract that would be binding on another."

In the case of *Mott vs. Cherryvale Water Co.*, 48 Kansas, 12; 28 Pac. Rep. 989, which was a case of fire loss because of breach of contract with a city in which the water company was required by the terms of ordinance under which it was operating to "pay all damages that may accrue to any citizen of the city by reason of a failure to supply a sufficient amount of water," etc, and the right to sue was denied, the opinion citing many like cases.

In *Fitch vs. Seymour Water Co.*, 37 N. E. Rep. 982, the Supreme Court of Indiana said that although the company had agreed specifically to do certain things which it failed to do, to the great damage of the plaintiff, that there was no privity of relation and the action could not be maintained. It was contended there, as here, that the obligation was not one of contract but one imposed by law, but this the court refused to adopt. This decision followed

the Iowa and Georgia cases and cited several other like cases, but commented with disapproval on *Paducah L. Co. vs. Paducah Water Co.*, 89 Ky. 340, said to be the only case of like nature holding the other way.

In *Fowler vs. Athens Water Co.*, 83 Ga. 219; 9 S. E. Rep. 673, the Supreme Court of Georgia, by Bleakley, C. J., said:

> "The present case is not based upon the breach of a statutory duty, but solely upon the failure to comply with a contract made with the municipal government of Athens. To that contract the plaintiff was not a party and the action must fail for the want of the necessary privity between the parties before the court. A case directly in point is *Davis vs. Water Works Co.*, 54 Iowa 59; see also *Nickerson vs. Hydraulic Co.*, 46 Conn., 24. There being no ground for recovery treating the action as one ex contractu, is it better founded treating it as one ex delicto? We think not. The violation of the contract entered into, the breach being one of mere omission or nonfeasance, is no tort to the private property of any individual, though he be a member of the community and a taxpayer to the government. Unless made so by statute, a city is not liable for failing to protect the inhabitants from destruction of property by fire. We are unable to see how a contractor with the city to supply water to extinguish fires, commits a tort by failing to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law. There was no error in granting the non-suit."

In *Ferris vs. Carson Water Co.*, 16 Nev. 444, the court, after discussing the principles, said: "The board of trustees of the town, in the exercise of a discretionary power conferred upon them by the legislature contracted for a supply of water for the extinguishment of fires. The plaintiff, in common with the other residents of the town, enjoyed the advantage of this contract. He had an indirect interest in the performance of the contract by the water company, as had all of the property-holders of the town, but such an interest is not sufficient to constitute the privity, either

directly or by substitution, which must exist in order to give him a right of action upon the contract."

In *Britton vs. Water Works Co.*, 81 Wis., every ground urged by the able counsel for the plaintiff in a like case was thoroughly considered by the court, speaking by Mr. Justice Orton, and the right of action was denied, the court declaring that to adopt the contention of the plaintiff would be to ingraft new and strange doctrines upon the well settled principles of the law.

In *Boston Safe Deposit & Trust Company vs. Salem*, 94 Fed. Rep. 238, Ricks, J., deciding against the right to maintain such an action, said:

> "The general doctrine held by the foregoing cases is that, where a city contracts with a water company to furnish a supply of water for use in extinguishing fires, such supply to be paid for by a levy of taxes upon the taxpayers of the city, there is no such privity of contract between a citizen or resident of such city and the water company as will authorize such resident or citizen to maintain an action against said water company for the injury or destruction of his property by fire caused by the failure of the water company to fulfill its contract; and this is held even where the ordinance granting the water company its franchise provides that the water company shall pay all damages that may accrue to any citizen of the city by reason of a failure on the part of such water company to supply a sufficient amount of water to put out fires. See *Mott vs. Manufacturing Co.*, and other cases cited supra. The only case in all the books where a water company has been held liable for failure to furnish sufficient water for the extinguishment of fires is the case of *Paducah Lumber Co. vs. Paducah Water-Supply Co.*, 89 Ky. 340, 12 S. W. 554, and 13 S. W. 249, in which case it was unnecessary for the court to have held this doctrine, as there was a private contract between the water company and the consumer for the furnishing of fire pressure. This Kentucky case has been repeatedly criticised by the courts of the various states in

which this question has been decided. See *Mott vs. Manufacturing Co., Britton vs. Waterworks Co., Fitch vs. Water Co., Howsman vs. Water Co., House vs. Waterworks Co., Waterworks Co., vs. Brownless,* and *Eaton vs Waterworks Co.,* cited supra."

And again:

"That a city owning its own waterworks cannot be held liable for failure to furnish sufficient water supply to extinguish fires is undisputed. 2 Dill, Mun. Corp. Sec. 975; *Wheeler vs. Cincinnati,* 19 Ohio St. 19: *Fowler vs. Waterworks Co.,* 83 Ga. 222, 9 S. E. 673; *Wainwright vs. Water Co.,* 78 Hun. 146, 28 N. Y. Supp. 987; *Tainter vs. City of Worchester,* 123 Mass. 311; *Vanhorn vs. City of Des Moines,* 63 Iowa, 447 19 N. W. 293; *Hayes vs. City of Oshkosh,* 33 Wis. 314; *Stone vs. Water Co.,* 4 Pa. Dist. R. 431; *House vs. Waterworks Co.* (Tex. Sup.) 31 S. W. 179, 185. If the city itself cannot be held liable for damage resulting from failure to furnish a fire pressure to its citizens, and if there is no privity of contract between the water company operating under a franchise from the city and the citizens or residents of such city, it is clear, upon principle as well as authority, that no legal obligation exists on the part of such water company and in favor of the individual citizen to maintain a sufficient pressure at the city water mains to extinguish fires which may occur upon the premises of such individual citizen."

Counsel has sought to avoid the difficulty of this aspect of the case by claiming that there was no contract, and further that even if there were that the statutes and regulations have still the effect which he claims. But it must be observed that they, being a part of the contract, could not be relied on independently of the contract. The breach of the contract is in reality the basis of the action, and the plaintiff was neither a party or privy to it.

Counsel claims that even within the decision of the Circuit Court of Appeals the defendant is liable because itself, as distinguished from its night agent, is well charged with negligence. But there is nothing to show that ordinary care was not used. What is suggested was such care as would amount to insurance of safety; at least extraordinary care. The regulation relied on by counsel, page 13 in their brief, requires the defendant to retain custody of mails delivered at night, "by placing the same in a secure and safe room or apartment of the depot or station until morning." In the complaint it is alleged, page 34 of Record, that the night agent received the mail sacks and deposited the same in the depot. Again on page 35 it is alleged that Soule or some unknown person, "did enter one of the rooms contained in said depot building where said mail sack or mail pouch had been placed by defendant's operator." These allegations show that the requirement of the regulation was complied with, except for the charge that the room was not safe enough to prevent a robbery. The complaint alleges fault alone in this, that the mail sack was not placed in "any *separate room, closet* or other *safe* receptacle, capable of being *securely* fastened against any intruder or unauthorized person, by lock and key or *otherwise.*" "That said room was not designed for or capable of safely keeping valuable articles or property." The regulation does not require "a separate room" but a "secure and safe room." Is it to be supposed that it was intended that the carrier should provide a room any more secure and safe than for property for which it was responsible as common carrier? Counsel has not alleged anything to show less care than was ordinarily bestowed on valuable freight at that station. It clearly appears from the complaint itself that the mail was properly placed, for it is alleged "That said Soule or other person, had no right of access to said room" (showing that it was not the public waiting room but the inner office) "but through the negligence of said defendant and its said night operator *did gain entrance to said room*" and further that the mail sack was "readily accessible to any person *gaining entrance* to said room." It is further alleged that the mail sack was wholly unprotected and unguarded by said night operator or otherwise *against* the person who had *gained access* to the room. What the complaint demands is in excess of the regulation and of the law. It requires such care that would successfully

resist all the machinations and violence of robbers. This is too much care for country railway stations. The railway companies would have to build fire proof and burglar proof rooms sufficient to thwart strategy and resist dynamite to meet the requirements suggested by plaintiff in error.

It is also claimed that the defendant itself is chargeable with negligence because the night agent was not sworn as required by law. But the regulations of Section 713, quoted on page 11 of their brief, expressly provide that such employees need not take the oath. Besides it cannot be assumed that the absence of the oath was the proximate cause of the loss.

It is respectfully submitted that, if the court assumes jurisdiction to review the decision of the Circuit Court of Appeals, the judgment should be affirmed.

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